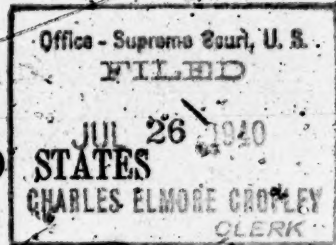


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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 283

RAILROAD COMMISSION OF TEXAS, LON A. SMITH,  
ERNEST O. THOMPSON, ET AL.,

*Appellants,*

*vs.*

THE PULLMAN COMPANY, GUY A. THOMPSON,  
TRUSTEE, THE ST. LOUIS, BRUNSVILLE AND  
MEXICO RAILWAY COMPANY, DEBTOR, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE WESTERN DISTRICT OF TEXAS

STATEMENT AS TO JURISDICTION.

GERALD C. MANN,  
*Attorney General of Texas,*  
CECIL C. ROTSCH,  
GLENN R. LEWIS,  
LEE SHOPTAW,  
A. B. CULBERTSON,  
CECIL A. MORGAN,  
*Counsel for Appellants;*

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IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE WESTERN DISTRICT OF TEXAS,  
AUSTIN DIVISION

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**Civil Action No. 38**

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THE PULLMAN COMPANY, ET AL.,

*Plaintiffs,*

*vs.*

THE RAILROAD COMMISSION OF TEXAS, ET AL.,

*Defendants.*

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**STATEMENT OF JURISDICTION AS REQUIRED BY  
SUPREME COURT RULE 12.**

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Your petitioners respectfully submit that the Supreme Court of the United States has jurisdiction on appeal to review the judgment in question in that Section 380, Title 28, Chapter 10, United States Code (Judicial Code, Section 266, Amended) provides:

“No interlocutory injunction suspending or restraining the enforcement, operation or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by any administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme



Court, or by the district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge \* \* \* An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case \* \* \* The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

In connection with the above statute your petitioners further show that an interlocutory injunction was issued in this case on the 28th day of November, 1939; that a 3-Judge Court was assembled, consisting of a Circuit Judge and two District Judges; that the case was heard before the three judges on its merits on the 17th day of February 1940, and that a final decree granting a permanent injunction in said suit was entered on the 23 day of April 1940.

The validity of the statutes of the State of Texas are involved, particularly Article 6445, which reads:

"Power and authority are hereby conferred upon the Railroad Commission of Texas over all railroads, and suburban, belt and terminal railroads, and over all public wharves, docks, piers, elevators, warehouses, sheds, tracks and other property used in connection therewith in this State, and over all persons, associations and corporations, private or municipal, owning or operating such railroad, wharf, dock, pier, elevator, warehouse, shed, track or other property to fix, and it is hereby made the duty of the said Commission to

adopt all necessary rates, charges and regulations, to govern and regulate such railroads, persons, associations and corporations, and to correct abuses and prevent unjust discrimination in the rates, charges and tolls of such railroads, persons, associations and corporations, and to fix division of rates, charges and regulations between railroads and other utilities and common carriers where a division is proper and correct, and to prevent any and all other abuses in the conduct of their business and to do and perform such other duties and details in connection therewith as may be provided by law."

Article 6448 reads:

"1. Adopt all necessary rates, charges and regulations, to govern and regulate freight and passenger traffic, to correct abuses and prevent unjust discrimination and extortion in rates of freight and passenger traffic on the different railroads in this State.

"9. Make and establish reasonable rates for the transportation of passengers over each railroad subject hereto, which rates shall not exceed the rates fixed by law. The Commission shall have power to prescribe reasonable rates, tolls or charges for all other services performed by any railroad subject hereto."

Article 6473 reads:

"If any railroad company, subject to the provisions of this title, or its agent or officer, shall charge, collect, demand, or receive a greater rate, charge or compensation than that fixed and established by the Commission for the transportation of freight, passengers or cars, or for the use of any car on the line of its railroad, or any line operated by it, or for receiving, forwarding, handling or storing any such freight or cars, or for any other service performed or to be performed by it, such railroad company and its agent and officer shall be deemed guilty of extortion, and shall forfeit and pay to the State of Texas a sum not less than one hundred nor more than five thousand dollars."



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Article 6474 reads:

"Unjust discrimination is hereby prohibited and the following acts or either of them shall constitute unjust discrimination.

1. If any railroad subject hereto, directly or indirectly, or by any special rate, rebate, drawback or other device, shall charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered by it than it charges, demands, collects or receives from any other person, firm or corporation for doing a like and contemporaneous service, or shall give any undue or unreasonable preference or advantage to any particular person, firm or corporation, or locality, or to subject any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage in any respect whatsoever."

The date of the final judgment sought to be reviewed is April 23, 1940. The day upon which the application for appeal is presented is 18 day of June, 1940. There is attached hereto a copy of the interlocutory order marked Exhibit "A", together with a copy of the final judgment marked Exhibit "B", together with a copy of the court's opinion marked Exhibit "C", all of which are incorporated herein by reference.

The Railroad Commission is the administrative department of the State Government of Texas and duly organized pursuant to Chapter 11, Title 112, Article 6444 to Article 6494 Vernon's Annotated Statutes of Texas. The Railroad Commission of Texas promulgated an order on November 4, 1939 regarding the operation by the railroad companies of sleeping cars, making certain findings that the manner in which the said railroad companies were now operating their sleeping cars was an abuse and an unjust discrimination as

to the passengers and making certain requirements of such companies. The railroad companies, together with The Pullman Company, have joined together as plaintiffs and challenged said order of the Railroad Commission on many grounds and asked for an injunction restraining the enforcement of such order.

The 3-Judge court entered its final decree or final judgment herein on the 23 day of April, 1940, and permanently enjoined the Railroad Commission of Texas, its members, officers and agents, as well as the Attorney General of Texas, from enforcing said order, which order related to the safety, care, comfort, convenience, proper accommodation, charges, fares and transportation of passengers on sleeping cars and Pullman cars within the State of Texas, and to prevent abuses, unjust discrimination and extortion in rates. The petitioners herein (defendants in the trial of this case) contend that said order was valid, just and reasonable and that the 3-Judge court abused its discretion in issuing a permanent injunction against the same in that the court substituted its own opinion for that of the findings and order of the Railroad Commission. The court's investigation and its conclusions were not limited to the constitutional questions involved, but the court invaded the province of the Commission, usurped its authority and substituted its own opinion and findings for that of an administrative body of the State.

See:

*Chicago, R. I. & P. R. Co. v. Arkansas*, 55 U. S. Sup. Ct. Reps.;

*Atlantic, etc. v. State of Georgia*, 234 U. S. 280, 58 L. Ed. 1313;

*G. C. & S. F. Ry Co. v. Texas*, 169 S. W. R. 385, affirmed by the Supreme Court, 62 L. Ed. 574; 246 U. S. 58;

*South Carolina, etc. v. Barnwell Bros., Inc.*, 82 L. Ed. 734.

WHEREFORE, we respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal.

GERALD C. MANN,

*Attorney General of Texas;*

CECIL C. ROTSCH,

GLENN R. LEWIS, and

LEE SHOPTAW,

*Attorneys for The Railroad Commission of Texas, Lon A. Smith, Jerry Sadler and Ernest O. Thompson, and Gerald C. Mann, Attorney General of Texas,*

By CECIL C. ROTSCH;

A. B. CULBERTSON,

CECIL A. MORGAN,

*Attorneys for Intervening Defendants M. B. Cunningham, W. M. Hadley and W. A. Worley,*

By CECIL A. MORGAN.

7  
**EXHIBIT "A".**

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE WESTERN DISTRICT OF TEXAS, AUS-  
TIN DIVISION.

Civil Action No. 38.

THE PULLMAN COMPANY et al., *Plaintiffs*,

*vs.*

THE RAILROAD COMMISSION OF TEXAS et al., *Defendants*.

Hearing of the application of the plaintiffs in the above cause for temporary restraining order having been set for this date, came the plaintiffs by their attorneys, and pursuant to due notice came also the defendants by their attorney, the Attorney General of the State of Texas; and the parties announced ready for said hearing, and after hearing and considering the verified amended complaint, and the argument of counsel; and it appearing that in the complaint the plaintiffs challenge the validity of certain orders of the Railroad Commission of Texas on Federal constitutional grounds and that substantial Federal questions are presented in the complaint and that this Court has jurisdiction of the parties and the subject-matter; and it having been made clearly to appear from specific facts shown by the verified complaint that, unless a temporary restraining order is granted, plaintiffs will suffer immediate and irreparable injury, loss and damage, in that the order of the Railroad Commission dated August 8, 1939 (Exhibit A in the complaint) and the order of the Railroad Commission dated November 4, 1939 (Exhibit F in complaint), impose heavy burdens upon the plaintiffs beginning December 1, 1939; and the plaintiffs are entitled by the laws of the State of Texas to have said orders reviewed in a court of competent jurisdiction in Travis County, Texas, and that there is no provision in the State law or in the challenged orders suspending their enforcement pending such review; and that, in the absence of a temporary restraining order or

injunction, plaintiffs will be subjected to prosecution for heavy, daily recurring, penalties for failing and refusing to obey said orders on and after December 1, 1939;

Wherefore, it is ordered that upon the filing by the plaintiffs of a good and sufficient bond in the sum of \$10,000.00 to be approved by the clerk of this Court, payable to the defendants named in the complaint, and conditioned that plaintiffs will answer for all damages and costs which the defendants may sustain in consequence of the issuance of this temporary restraining order, or of any extensions thereof, the clerk of the United States District Court for the Western District of Texas issue a temporary restraining order enjoining and restraining the defendants Railroad Commission of Texas and the members thereof and the Attorney General of the State of Texas, their respective representatives, agents, servants and employees, from attempting to enforce against the plaintiffs, or any of them, the aforesaid orders of the Railroad Commission of Texas (Exhibits A and F attached to the complaint), and from instituting or prosecuting any suit or suits against the plaintiffs, or any of them, for penalties, or otherwise, for violation of said orders, or any part thereof. And it is further ordered only until the hearing and determination of the application for interlocutory injunction upon notice. And it is further ordered that a statutory three judge court be convened at —, Texas, on the — day of —, 19—, at — —. M., for the purpose of hearing plaintiffs' application for interlocutory injunction; and that the defendants and the Governor of Texas be given notice of said hearing as required by Section 380, Title 28, United States Code, and the clerk is directed to issue for service on said interested parties copies of this order.

Done at Waco, Texas, this the 28th day of November, A. D. 1939.

CHARLES A. BOYNTON,  
*United States District Judge.*



**EXHIBIT "B".****THE DISTRICT COURT OF THE UNITED STATES  
FOR THE WESTERN DISTRICT OF TEXAS, AUS-  
TIN DIVISION.**

Civil Action No. 38.

THE FULLMAN COMPANY et al., *Plaintiffs,**vs.*THE RAILROAD COMMISSION OF TEXAS et al., *Defendants.***Judgment.**

This action came on to be heard on February 17, 1940, at this term on the plaintiffs' motion for preliminary injunction, and at the same time on final trial on the merits, before a statutory court of three judges consisting of Sibley, Circuit Judge, and McMillan and Allred, District Judges; and, upon conclusion of the evidence, was argued by counsel, and thereupon, upon consideration thereof, it was Ordered, Adjudged and Decreed as follows, viz:

1. That the defendants' motions to dismiss the action be and are hereby overruled.

2. That the defendants, the Railroad Commission of Texas and Lon A. Smith, Ernest O. Thompson and Jerry Sadler, members of said commission, and Gerald C. Mann, Attorney General of the State of Texas, their respective successors, agents, representatives and employees, be and they are, each and all, hereby permanently enjoined from attempting to enforce against the plaintiffs, or any of them, the order of the Railroad Commission of Texas dated November 4, 1939 (Railroad Commission Docket No. 3669-R, an "Order amending passenger circular No. 164, issued by the Railroad Commission of Texas on the 8th day of August, 1939") and the order of the Railroad Commission of Texas dated the 8th day of August, 1939, known as Passenger Circular 164, copies of which are attached to the Amended Complaint as Exhibit F and Exhibit A, respectively; and from instituting or prosecuting any suit or suits against the plaintiffs, or any of them, for penalties, or



otherwise, for the violation of said orders, or any part thereof; and from taking any steps whatsoever looking to the enforcement of said orders, and from seeking in any way to penalize plaintiffs, or any of them, for violating or not obeying said orders, or any part thereof.

3. All costs incurred by the intervening defendants, or occasioned by their intervention, are taxed against said intervening defendants, M. B. Cunningham, W. A. Worley and W. M. Hadley. All other costs are taxed against the defendant the Railroad Commission of Texas.

To all of which judgment the defendants, including the intervening defendants, duly excepted.

Done this 23 day of April, 1940.

SAMUEL H. SIBLEY,  
*Circuit Judge;*  
ROBERT J. McMILLAN,  
*District Judge;*  
JAMES V. ALLRED,  
*District Judge.*

Approved as to form:

CECIL C. ROTSCH.

CECIL A. MORGAN.

### EXHIBIT "C".

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION.

Civil Action No. 38.

THE PULLMAN COMPANY et al., *Plaintiffs,*

*vs.*

THE RAILROAD COMMISSION OF TEXAS et al., *Defendants.*

Before Sibley, Circuit Judge, and McMillan and Allred,  
District Judges.

Per CURIAM:

The Pullman Company and a large number of Railway Companies operating in Texas and Trustees in charge of

Railways operating in Texas bring this suit against the Railroad Commission of Texas, the various members thereof and the Attorney General, to restrain the enforcement of a certain order made by the Commission on the 4th day of November, 1939.

The order purports to be made pursuant to the statutes of the State of Texas and a sum in excess of the jurisdictional amount is shown to be involved. The ground of attack is the unconstitutionality of the order. A temporary restraining order was applied for and granted. Accordingly, a case for three judges, under Section 266 of the Judicial Code, is presented. The case has been tried on its merits by a court so organized.

Upon the trial, without objection on the part of anyone, leave was granted to three Pullman porters and to three Pullman conductors to intervene. The Pullman porters made common cause with the plaintiffs and the Pullman conductors aligned themselves with the defendants.

The order complained of is long and contains some twenty-nine very extensive findings of fact. These are followed by certain recitals labeled as orders and certain decrees with regard to rates which may be charged under certain circumstances by the Railroads and the Pullman Company. However, the gist of the order and the provision which is particularly assailed and which it is manifest it was the prime purpose of the order to put into effect, is as follows:

"It is further ordered, adjudged and decreed that no sleeping car shall be operated on any line of railroad in the State of Texas when occupied by passengers holding the proper transportation for the accommodation of such cars, unless such cars are continuously in the charge of an employee or an authorized agent of the firm or corporation owning or operating the same having the rank and position of Pullman conductor."

Plaintiffs make their attack upon a great many grounds. It is unnecessary to mention more than two or three of them. It is first asserted that the order is not within the authority delegated to the Railroad Commission by any statute or law of the State of Texas. It is said, second,

that in so far as it purports to relate to transportation rates, it is void for the reason that it was issued without notice of a hearing for such purpose. It is further contended that the order is unjust, arbitrary, unsupported by any basis in fact and, accordingly, confiscatory. Defendants joined issue with plaintiffs upon these matters and evidence was introduced at great length by both sides.

It appears without contradiction that there are some sixteen or seventeen routes in Texas where the Pullman cars, so far as the Pullman Company is concerned, are in charge of a porter. In most cases, this occurs only where the distance traversed is short, and it is invariably true that it occurs only in instances where there is only one Pullman car on the train. The general control of the Pullman car and the passengers therein is lodged in the Railroad conductor. On trains where two or more Pullman cars are being carried contemporaneously, a Pullman conductor is in charge, subject, however, to the train conductor.

We are confronted at the outset by the question as to what authority the Railroad Commission has to make the challenged order. The Railroad Commission is a creature of statute. It gets no authority by implication or from the common law. It is given the authority by statute to correct abuses, but the Texas courts have been uniform in holding that the abuse must be one defined by law. In *Railroad Commission v. H. & T. C. Ry. Co.*, 90 Texas, at Page 352, the Supreme Court says:

"The question then arises, What abuses can the Railroad Commission correct? We think that it must be some abuse which has been defined by the law, and that the Commission would not by this power be authorized to enact a law defining what is an abuse or a disregard of duty on the part of a railroad corporation."

In *State v. Sugarland Ry. Co.*, 163 S. W. 1047 (writ refused), the Court said:

"The Commission is a creature of the statute, based upon constitutional provision for the establishment of an agency in this state, with such powers as may be deemed adequate and advisable. Section 2, Art. 10, Const. of Texas. Being

a creature of statute, with such powers only as the Legislature deemed adequate and advisable, it could deraign no authority by implication or from the common law. See *Railroad Commission v. G., H. & S. A. Ry. Co.*, 51 Tex. Civ. App. 447, 112 S. W. 353. An order of the Commission, to be valid, must be based upon some express provision or delegation of power made by statute. *R. R. Com. v. G., H. & S. A. Ry.*, *supra*; *I. & G. N. R. R. Co. v. R. R. Com.*, 99 Tex. 332, 89 S. W. 961. We think that, before the appellee could claim the protection of such order, it must be able to put its finger upon the statute conferring upon the Commission the authority to make the same, which has not been done."

See also *State v. St. L. S. W. Ry. Co.*, 165 S. W. 491.

There is no Texas statute which forbids the operation of a train carrying a Pullman car without a Pullman conductor, nor is there any statute that defines such action as an abuse. The Legislature has fixed the necessary members of a train crew and a Pullman conductor is not included. Article 6380, Vernon's Annotated Texas Statutes, 1925. Defendants do not deny the correctness of the law as set out in the decision quoted from. In fact they state, upon page 13 of their brief, that they concur in those views. Being called upon to put their finger upon the statute which authorizes the making of an order of this kind, they point to Article 6474. That Article does not denounce the transportation of a Pullman car without a Pullman conductor as an abuse, but relates to the matter of unjust discrimination and defines certain things which shall, under its terms, constitute unjust discrimination. It is summarized by defendants in their brief as follows:

"A duty is imposed on the railroads not to give any undue or unreasonable preference to any person or locality or subject any traffic to any disadvantage whatsoever, and a penalty is prescribed for failing to observe such duty."

We are not of the opinion that the order is sustained by the provisions of this statute. It will be noted that the statute denounces unjust discrimination. The Supreme Court of Texas, in construing Section 2 of Article 10 of the

Constitution, upon which the statute is based, said, in *St. Louis Southwestern Railway Co. v. State of Texas*, 113 Tex. at page 579:

"But, whatever meaning should be ascribed to the word unjust, two things seem perfectly plain in construing Section 2 of Article X, of the Constitution, to-wit: first, that all discrimination in passenger fares was not forbidden, but only such as would operate unjustly."

It is certainly not an unjust discrimination to adapt the service to different conditions of traffic. Every train is not required to be the duplicate of every other train in order to avoid unjust discrimination. The record in the case fails to support the contention that there is any unjust discrimination as against the public generally by reason of the fact that on certain trains where only one Pullman car is being handled, the operation, so far as the Pullman Company is concerned, is in charge of a porter, who is subject to the direction and control of the train conductor. However, without regard to these matters, the order cannot be upheld as a correction of an unjust discrimination, because it is not within the Legislative definition of that term and the Commission is without power to make one of its own.

As we have heretofore noted, it cannot stand as a correction of an abuse, because the so-called abuse has not been defined or prohibited by law.

The regulation cannot be sustained as a rate order for the reasons, first, it was not made after notice given as required by law, and second, it is apparently predicated upon an attempt upon the part of the Commission to construe and enforce certain contracts between the Railroads and the Pullman Company, which it is without any statutory authority to do. Furthermore, in so far as it attempts to regulate the rates charged by the Pullman Company, it is void, as the Commission has no jurisdiction over the Pullman Company.

The intervenors Pullman conductors have raised on their own account certain jurisdictional questions, predicated upon the assertion and assumption in some instances, that plaintiffs are operating their railroads in Texas in violation of the law. If it be conceded that, as intervenors, they have

the right to question the propriety of the main proceeding in this fashion, we are still of the opinion that their contention is without merit and should be overruled.

The views which have been expressed make it unnecessary to rule on the question as to whether the order is arbitrary. The Commission being without statutory authority to make an order of this character, the question as to its reasonableness is immaterial.

It accordingly follows from what has been said that a decree should be entered for the plaintiffs, and its terms may be settled after notice.

SAMUEL H. SIBLEY,  
*Circuit Judge;*

JAMES V. ALLRED,  
*District Judge;*

ROBERT J. McMILLAN,  
*District Judge.*

(CA No. 38, The Pullman Company et al. v. The Railroad Commission of Texas et al.; page 6, Opinion of the Court.)

Endorsed: Civil Action No. 38. In the District Court of the United States for the Western District of Texas, Austin Division, The Pullman Company, et al., Plaintiffs v. Railroad Commission of Texas, et al., Defendants Statement of Jurisdiction as Required by Supreme Court Rule 12. Filed: 18th Day of June, 1940. Maxey Hart, Clerk, by Joe Steiner, Deputy.